Supreme Court, U.S.
FILED

98 267 MAY 28 1998

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NO.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1997

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners,

v.

COUNTY OF ADAMS, et. al.,

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners

v.

COUNTY OF ADAMS, et. al.,

CORRECTED
PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE NEBRASKA SUPREME COURT ERRED IN RELYING, IN PART, ON A SUBSEQUENTLY ENACTED STATUTE IN CONSTRUING NEBRASKA LAW TO HOLD THAT NO CONTRACTUAL RIGHT VESTED TO EMPLOYER GENERATED PENSION CONTRIBUTIONS UNDER NEB.REV.STAT.§23-2310 IN VIOLATION OF THE CONTRACT CLAUSE,ARTICLE I, SECTION 10, CLAUSE 1, AND THE DUE PROCESS CLAUSE. OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

PARTIES TO THE PROCEEDING

Petitioners

Daniel Hoins and Byron Buzek are residents of Cass County and Saline County, Nebraska, respectively, and bring this action on behalf of themselves and approximately 6,000 other persons who are similarly situated and reside in the state of Nebraska, pursuant to Neb. Rev. Stat. Section 25-319. The Class consists of all past and current employees of the Defendant Class of Nebraska Counties, who have participated in the Retirement System for Nebraska Counties since January 1, 1983, or are currently participating in said system.

Defendants

The Defendants include ninety one Nebraska Counties which participate in the Retirement System for Nebraska Counties established by Neb. Rev. Stat. Section 23-2301 et. seq. and specifically include the following Nebraska Counties:
Adams, Antelope, Arthur, Banner, Blaine, Boone, Box Butte, Boyd, Brown, Buffalo, Burt, Butler, Cass, Cedar, Chase, Cherry, Cheyenne, Clay, Colfax, Cuming, Custer, Dakota, Dawes, Dawson, Deuel, Dixon, Dodge, Dundy, Fillmore, Franklin, Frontier, Furnas, Gage, Garden, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Kimball, Knox, Lincoln, Logan, Loup, Madison, McPherson, Merrick, Morrill, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Perkins, Phelps, Pierce, Platte, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Scottsbluff, Seward, Sheridan, Sherman, Sioux, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster,

Wheeler, and York.

THE RETIREMENT SYSTEM FOR NEBRASKA COUNTIES, an Agency of the State of Nebraska, and THE PUBLIC EMPLOYEES RETIREMENT BOARD, an Agency of the State of Nebraska; and Harry A. Spencer, in his capacity as a member of the Public Employees Retirement Board; Robert Corner, in his capacity925Xamember of the Public Employees Retirement Board; Robert Giese, in his capacity as a member of the Public Employees Retirement Board; Al Curtis Robinson, in his capacity as a member of the Public Employees Retirement Board; William Lindsay, Jr.,in his capacity as a member of the Public Employees Retirement Board; James D. Murphy, in his capacity as a member of the Public Employees Retirement Board; and Connie Witt, in her capacity as a member of the Public Employees Retirement Board. and E. Benjamin Nelson, Governor of the State of Nebraska.

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court is published at Hoiengs v. County of Adams, 254 Neb. 64,574 N.W.2d 498 (1998) and is reprinted in the Appendix herein. The 1994 opinion of the Nebraska Supreme Court in this case is published at Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994) and is reprinted in the Appendix herein. Relevant portions of the Nebraska County Employees Retirement Act are also reprinted in the Appendix hereto.

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STATEMENT OF JURISDICTION

Petitioners assert that this Court has jurisdiction under 28 U.S.C. §1751 to review a February 27, 1998 decision of the Nebraska Supreme Court. This is a case wherein the Nebraska Supreme Court refused to rule upon the issue of whether a district court decision violated the Due Process Clause and the Contract Clause in giving a later enacted statute retrospective effect to reduce the previously vested rights of county employees to employer generated pension contributions. Instead, the Nebraska Supreme Court ruled that the constitutional issue was moot because Neb.Rev.Stat.§23-2310 ,the statute setting the amount of the employee contribution setting the employer contribution at 250 percent of the amount contributed by an employee was ambiguous in light of Neb.Rev. Stat. §23-2308 and that therefore, §23-2310 must be construed as meaning 150 percent despite the express language of §23-2310 setting the amount at 250 percent. In doing so the Nebraska Supreme Court relied, in part, upon the language of a subsequently enacted statute, LB1057, as evidence of legislative intent supporting its holding that 150 percent

was the proper pension contribution.

Petitioners argue that this court has jurisdiction to review a decision wherein a state determines that a subsequently enacted statute impairs or negates the obligations of a contract to which the state or its agents is a party.

STATEMENT OF THE CASE

The first of these two consolidated cases, Hoieings v. County of Adams, et. al., Lancaster County District Court Docket 472, Page 146 (hereinafter referred to as Hoieings I) was filed in 1991 as a class action under the Declaratory Judgment Act in Lancaster County District Court. The Plaintiff was initially William Fairbanks, but Plaintiff Daniel Hoins, aka Hoiengs was later substituted as Plaintiff. Named as Defendants were 91 Nebraska Counties and the Retirement System for Nebraska Counties. This matter was previously before the Nebraska Supreme Court. See, Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994).

On April 15, 1992, after the filing of the first case but before trial, the Nebraska Legislature passed LB1057 which changed the language of §23-2310 and actually reduced the amount of the employer funded contribution from 250% to 150% for all previous years. On August 18, 1992 the Lancaster County District Court granted a demurrer dismissing the first action for failure to state a cause of action. The first case was appealed to the Nebraska Supreme Court. The Nebraska Supreme Court on May 12, 1994 reversed and remanded, finding that the Plaintiff had stated a cause of action in contract. LB1057 and the issue of retrospective application thereof was not discussed in the Nebraska Supreme Court's 1994 opinion. On May 2, 1995, while the first suit was pending on

remand in Lancaster County District Court the second of these two consolidated actions was filed. That second suit involved the same parties and requested a determination that LB1057 was unconstitutional. The Lancaster County District Court consolidated the two cases in December, 1996.

The second case, Hoiengs v. County of Adams, et. al, Lancaster County District Court Docket 527, Page 114 (hereinafter referred to as Hoiengs II) was filed May 2, 1995. Like Hoiengs I, it involved a class action, and related to provisions of the County Retirement Act. Hoiengs II sought a declaratory ruling that a 1992 Amendment to the Act,LB1057, was unconstitutional in that it violated the due process and contract clauses of the U.S. and Nebraska Constitutions.

Both cases were brought under the Nebraska Declaratory Judgments Act. 25-21,145 et. seq. The cases were consolidated for trial over objection of the Plaintiffs. On December 20, 1995 the Court heard reciprocal motions for Summary Judgment on behalf of Plaintiffs and Defendants.

On March 28, 1996 the Lancaster County District Court granted Summary Judgement for Defendant Counties Cass and Saline and against Plaintiffs Buzek and Hoins. That Court specifically held: 1) that the County Retirement Act from 1983 to 1992 required an employer contribution of 150% because, although the express language of Neb.Rev.Stat. §23-2310(1) clearly specified an employer contribution of 250% that because §23-2308 "refers to a requirement that the County Clerk pay the 100% of the employee's contribution and the 150% of the employer contribution, totalling 250%" 2) that LB1057 was a "curative" act that applied retrospectively to the County

Retirement Act; and 3) that because of the retrospective effect of LB1057 the Plaintiffs' rights to an employer contribution under the County Retirement Act only vested in an employer contribution of 150% instead of the 250% specified in §23-2310(1).

In the decision at issue here the Nebraska Supreme Court held that the express language of Neb.Rev.Stat. §23-2310 in setting the pension contribution of a public employer at 250% of the amount contributed by the employee was ambiguous and made in error by the Nebraska Legislature. The Nebraska Supreme Court in doing so refused to rule on the constitutionality of the later enacted LB1057 but went on to cite LB1057 in its opinion as evidence of legislative intent that the contribution requirement of 250% contained in §23-2310 must be read as 150%.

CONSTITUTIONAL PROVISIONS AND STATUTES

Contract Clause, Article I, Section 10, Clause 1, United States Constitution

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Due Process Clause, Amendment 5, United States Constitution.

> "No person shall. . .be deprived of life, liberty, or property, without due process of law. . ."

Amendment 14, Section 1, United States Constitution

> ". . .No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

Neb.Rev.Stat.(Reissue 1991).**23-2301.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2302.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2305.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2306.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2307.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2308.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2309.** See Appendix.
Neb.Rev.Stat.(Reissue 1991).**23-2310.** See Appendix.

REASONS FOR GRANTING CERTIORARI

I. WHETHER THE NEBRASKA SUPREME COURT ERRED IN RELYING,IN PART, ON A SUBSEQUENTLY ENACTED STATUTE IN CONSTRUING NEBRASKA LAW TO HOLD THAT NO CONTRACTUAL RIGHT VESTED TO EMPLOYER GENERATED PENSION CONTRIBUTIONS UNDER NEB.REV.STAT.§23-2310 IN VIOLATION OF THE CONTRACT CLAUSE,ARTICLE I, SECTION 10, CLAUSE 1, AND THE DUE PROCESS CLAUSE. OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners urge this court to grant certiorari to determine whether the Nebraska Supreme Court is construing Nebraska law in derogation of the Contract Clause, Article I, Section 10, Clause 1, and the Fifth and Fourteend Amendments to the United States Constitution. This question is posed in the context of whether Petitioners have a right to an employer generated pension contribution of 250% of the amount contributed by the employee as stated in Neb.Rev.Stat.§23-2310,,enacted in 1983.

The question before the Nebraska Supreme Court on appeal here was whether the District Court erred in finding that LB1057, a statute enacted subsequently to §23-2310, should be given retrospective effect to reduce the 250 percent contribution required of ninety one Nebraska Counties under §23-2310 to 150 percent.

The Nebraska Supreme Court ruled that the issue of the constitutionality of LB1057 was moot because the Petitioners had no vested contractual right to an employer

contribution of 250 percent, notwithstanding the language of §23-2310.. In so holding, the Nebraska Supreme Court held that the express language of §23-2310 which required a contribution of 250 percent was in conflict with the language of §23-2308 which states:

> "The County clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amount deducted from the compensation of the employee in accordance with §23-2307."

The Nebraska Supreme Court held that because of the language of §23-2308 that §23-2310 was ambiguous and therefore each reference to 250 percent contained within §23-2310 must be read as meaning 150 percent. In reaching this conclusion the Nebraska Supreme Court relied upon the legislative history of previous legislation and in part upon the language of LB1057 as evidence of the intent of the Nebraska Legislature that the amount of the employer contribution be 150 percent instead of 250 percent.

The Nebraska Supreme Court earlier ruled in this case that the Petitioners had, in asserting a right to an employer contribution of 250% under §23-2310 stated facts constituting a cause of action which, if proven, would give rise to a legal liability under the law. Hoeings v. County of Adams, 245 Neb. 877 (1994).

The Nebraska Supreme Court first dealt with this case in 1992 on appeal from the District Court's order sustaining Defendants' demurrers to Plaintiff's Petition. Plaintiff sought a declaratory ruling that the amount of the employer requirement required by the County Retirement Act, codified at Neb.Rev.Stat. §23-2301 et.seq., (Reissue 1991) was 250% and not the 150% that the Defendant

Counties were actually paying.

The Nebraska Supreme Court issued its opinion in that case, Hoeings v. County of Adams, 245 Neb. 877 (1994), holding as follows: 1) that the District Court did have jurisdiction of this matter and the parties, 2) that substitution of Plaintiffs Hoeings for Fairbanks was proper, 3) that Plaintiff did state a cause of action on behalf of himself and the class, 4) that Neb.Rev.Stat. §23-135 did not apply, 5) that the Administrative Procedures Act did not apply, 6) that there was no misjoinder of parties or causes of action, 7) that Plaintiff could maintain an action for declaratory judgment, 8) that sovereign immunity had been waived for both the Retirement System and the Counties by the terms of the County Retirement Act; and 9)that the PERB was not an administrative agency for purposes of the County Retirement Act.

In reaching its 1994 decision in this case the Nebraska Supreme Court necessarily had to determine what amount of employer contribution the County Retirement Act requires in order to determine whether Plaintiff had stated, or could state, any cause of action. Nebraska law requires that when considering whether a District Court's order sustaining a demurrer should be affirmed or reversed the Court must consider whether a Plaintiff can ultimately recover. A case will not be reversed where the complaining party will not be entitled to a judgment in any event. Swink v. Smith, 173 Neb. 423 (1962); Bohmont v. Moore, 141 Neb. 91, (1942). Appellant submits that this Court, in deciding Hoeings, logically had to consider all aspects of the law to determine if there was any way in which Hoeings could ultimately recover under the allegations in his petition. This court was required to consider the case on the law as it existed on the date of judgment. Summerville v. North Platte Valley Weather

Control Dist., 170 Neb. 46 (1960). State v. Thayer, 235 Neb. 70 (1990).

In reaching its holding the Hoeings Court noted that the employer contribution under the act was set by Neb. Rev. Stat. §23-2310 (Reissue 1991). Hoeings at 883-884,896. A matter controlled by statute presents a question of law. In Re: Interest of Jaycox, 250 Neb. 67 (1996).

A determination that the employer contribution is 250% is a necessary and integral part of the Court's ruling in Hoeings and, as such, is the law of the case. State ex rel Hilt Truck Line, Inc. v. Jensen, 218 Neb. 591 (1984). In Latenser v. Intercessors of the Lamb, Inc., 250 Neb. 789 (1996), the Court reiterated the basic premise of the doctrine of the law of the case, which states that the holding of an Appellate Court on questions presented to it in reviewing proceedings of a Trial Court become the law of the case, and those holdings conclusively settle, for purposes of that litigation, all matters ruled upon either expressly or by necessary implication. Latenser held that, under this doctrine, matters previously addressed in the Appellate Court are not reconsidered unless the party seeking such reconsideration presents materially and substantially different facts. Nobel v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1953). Noble made it clear that when an Appellate Court rules on whether factual allegations in a petition state a cause of action such that a demurrer will not lie, that ruling establishes the law of the case and where those same facts are later proven on remand the law of the case as established by the Appellate Court controls.

As the Nebraska Court has previously stated, in a 'cause of action' is a judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has breached

that duty. In determining whether a demurrer should lie, the Court must also decide whether there is any way Plaintiff can recover. If there is no way in which a plaintiff can recover an order sustaining, a demurrer will be affirmed, even if the District Court sustained the demurrer for the wrong reason.

The Nebraska Court in 1994 concluded very clearly that a cause of action was stated, that if proven, would entitle the petitioners to a judgment.

A reading of this Court's decision in Hoeings clearly demonstrates that this Court considered the question of the amounts of the employer contribution in considerable detail and found that the Petitioners had a viable cause of action.

The 1998 decision of the Court in effect took away the Petitioners constitutionally vested cause of action, and went on to rule that Petitioners had never had a right to the pension contribution of 250%. The Nebraska Court did so in partial reliance on the language of LB1057 as evidence of the intent of the Nebraska Legislature.

Petitioners urge in support of a grant of certiorari that there exist no independent and adequate state grounds for the Nebraska Supreme Court's decision in this case which do not involve issues of constitutional magnitude.

The Nebraska Supreme Court in its 1998 decision simply held that Petitioners had no right to a pension contribution of 250% because the statute setting the 250% requirement when read in light of earlier legislation had to be regarded as absurd. The Court did so in complete disregard for its earlier 1994 decision finding Petitioners had a cause of action which under Nebraska law is defined as a set of facts which, if proven, give rise to a legal

liability (Hoieings v. County of Adams, 245 Neb. 877 (1994). However, in doing so, the Nebraska Supreme Court also cited the subsequently enacted statute.

Before a party may assert due process argument it must establish that it has legitimate claim of entitlement to right being asserted. New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474 (7th Cir. 1990). Petitioners have such a claim by virtue of the language of §23-2310 and the decision of the Nebraska Supreme Court in Hoiengs v. County of Adams, 245 Neb. 877 (1994).

Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by subsequent act of the legislature. Ritter v. Drainage Dist. No. 1 of Otoe and Johnson Counties, 137 Neb. 866 (1940). Statute may not operate retroactively where it would impair obligation of contract or interfere with vested right. State ex re Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445 (1979). Monahan Cattle Co., v. Goodwin, 201 Neb. 845 (1987). Karrer v. Karrer, 190 Neb. 610 (1973). retroactively to deprive property owner of his previously vested rights. City of Omaha v. Glissmann, 151 Neb. 895 (1949).A municipal ordinance cannot operate retroactively to deprive a property owner of previously vested property rights. Baker v. Sommerville, 138 Neb. 466 (1940).

Due process clauses' procedural protection of property is a safeguard of security of interest that a person has already acquired in specific benefits. Assoc. of State Prosecutors v. Milwaukee County, 544 N.W. 2d 888 (Wis. 1996). Each listed member and retiree of county retirement plan had a property interest in retirement system protected by due process clause. The gravity of a property deprivation is irrelevant to the question of whether such

rights are violated without due process. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989). A West Virginia court has recognized that pension plan participants had contractually vested property rights created by pension statutes and that such rights were enforceable and could not be impaired or diminished by the state. A Wisconsin Court has held that the right created by the pension statues vest in a constitutional sense even though the right created by the statute may be inconsistent with the prior expressed intent of the legislature as demonstrated by the legislative history. Wisconsin Retired Teachers Assn'n v. Employee Trust Funds Board,537 N.W.2d 400 (Ct. App. 1995). There the court relied on Giessel and held that the annuitants of the Wisconsin Retirement System had a property interest in the earnings of their trust fund. State Teacher's Retirement Board v. Giessel, 106 N.W.2d 301 (1960).

The Nebraska Supreme Court decided this case in a way which directly contradicts the legal principles laid down by this Court in Home Buildings & Loan Assn. v. Blaisdell, 290 U.S.398 (1934);(Obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them. . .and impairment. . .has been predicated upon laws which without destroying contracts derogate from substantial contractual rights.) United States Trust Co. v. New Jersey, 431 U.S. 1, (1977); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). See also, Nev. Employees Assoc., Inc. v. Keating, 903 F.2d 1223 (9th Cir. 1990).

While it is also recognized that generally the construction given by state courts to State laws and State constitutions are binding and conclusive upon the Federal Courts, the rule does not extend to cases in which this Court is called upon to interpret the contracts of the States.

Jefferson Branch Bank v. Skelly., 66 U.S. 436 (1861). Petitioners submit that this is a case where the Nebraska Supreme Court construed the terms of a contract between petitioners and political subdivisions of the State of Nebraskan, namely, the ninety one counties of the State that participate in the County Employees Retirement System. Vogel v. Bartels, 1 Neb. App. 1113, 510 N.W.2d (1993). Petitioners argue that because of the State's direct involvement in this contract via the ninety-one counties, that the construction of the Nebraska Supreme Court in this case not be regarded as binding and conclusive and that this court has and should take jurisdiction under 28 U.S.C.§1751. Yazoo & M.V.R.Co. v. Adams, 180 U.S. 1, reh.den. 181 U.S.580 (1850). Hoadley's Admrs. v. San Francisco, 124 U.S. 639 (1888).

In conclusion Petitioners submit that there exist no independent and adequate grounds which justify the decision of the Nebraska Supreme Court and which do not involve issues of constitutional magnitude.

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NO.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1997

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners,

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COUNTY OF ADAMS, et. al.,

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated

Petitioners

v.

COUNTY OF ADAMS, et. al.,

APPENDIX TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Daniel Hoiengs, also known as Daniel Hoins, on behalf of himself and all other persons similarly situated, and Byron Buzek, on behalf of himself and all other persons similarly situated, Appellants,

v.

County of Adams et al., Appellees.

Case Caption

Hoiengs v. County of Adams

Filed February 27, 1998. No. S-96-605.

Appeal from the District Court for Lancaster County: Earl J. Witthoff, Judge. Affirmed.

Mary C. Wickenkamp and, on brief, Richard E. Scott and Brian R. Watkins for appellants.

Randall L. Goyette and Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, and Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellees County of Adams et al.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellees E. Benjamin Nelson et al.

Steven L. Willborn for amici curiae Nebraska Sheriff's Association and Nebraska Fraternal Order of Police.

HOIENGS v. COUNTY OF ADAMS
NO. S-96-605 - filed February 27, 1998.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
4. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the pleader's conclusions.
5. **Statutes: Legislature: Intent.** In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails.
6. _____: _____: _____. The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature; all subordinate rules are mere aids in reaching this fundamental determination.
7. **Statutes.** It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible.

8. _____. Where it is possible to harmonize apparently conflicting statutes, such is to be done.

9. _____. In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.

10. _____. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.

11. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.

12. **Statutes: Appeal and Error.** Courts will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results.

13. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and McCORMACK, J.J.

CAPORALE, J.

I. STATEMENT OF CASE

This is the second appearance in this court of this matter which seeks a declaration that under the County Employees Retirement Act, Neb. Rev. Stat. Sec. 23-2301 et seq. (Reissue 1991 & Cum. Supp. 1992), the defendant-appellee counties are required to make employee account contributions not of 150 percent but of 250 percent of the amount deducted from the compensation paid to members of the retirement system. In the first appearance, Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994) (Hoiengs I), we held that the then plaintiff-appellant, Daniel Hoiengs, had stated a cause of action on his own behalf and on behalf of a class and that the district court had thus erred in sustaining the counties' demurrers and in dismissing the petition. (As the records show variation in the spelling of this party's surname, we have elected to continue using the spelling shown in Hoiengs I.) Byron Buzek was thereafter added as a plaintiff, and a separate action was filed, seeking a declaration that a 1992 amendment to the retirement act is unconstitutional. The district court consolidated the two actions and ultimately entered summary judgment against the plaintiffs in both actions. The plaintiffs thereupon appealed, asserting, in summary, that the district court erred (1) in not applying the law of the case as established in Hoiengs I, (2) in its construction of the retirement act, and (3) in failing to hold the 1992 amendment unconstitutional. The record failing to sustain the assignments of error, we affirm.

II. SCOPE OF REVIEW

Resolution of the cases depends upon the interpretation of statutes, a matter which presents a question of law. State ex rel. Garvey v. County Bd. of Comm., 253 Neb. 694, _____ N.W.2d ____ (1988).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. Garvey, supra; Johnson v. School Dist. of Millard, 253 Neb. 634, _____ N.W.2d _____ (1998).

III. FACTS

The retirement act, which came into being via 1965 Neb. Laws, ch. 94 Sec. 2, p. 403, establishes a retirement system for certain county employees. It has been amended from time to time, and as of June 1, 1991, the relevant sections provided in part:

> Each employee who is a member of the retirement system shall pay to the county or have picked up by the county a sum equal to three and two-tenths percent of his or her compensation for each pay period. The county shall pick up the employee contributions required by this section for all compensation paid on or after January 1, 1985, and the contributions so picked up shall be treated as employer contributions in determining federal tax treatment under the United States Internal Revenue Code, except that the county shall continue to withhold federal income taxes based upon these contributions until the Internal Revenue Service, or the federal courts, rule that, pursuant to section 414(h) of the United States Internal Revenue Code, these contributions shall not be included as gross income of the employee until such time as they are distributed or made available. The county shall pay these employee contributions from the same source of funds which is used in paying earnings to the employee. The county shall pick up these contributions by a compensation deduction either through a reduction in the cash compensation of the employee or a combination of a reduction in compensation and offset against a future compensation increase. Employee contributions

picked up shall be treated for all purposes of the County Employees Retirement Act in the same manner and to the extent as employee contributions made prior to the date picked up.

Sec. 23-2307 (Reissue 1991).

The county clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amounts deducted from the compensation of employees in accordance with the provisions of section 23-2307.

Sec. 23-2308 (Reissue 1991).

A member's share of the fund arising from the compensation deductions made in accordance with section 23-2307 shall be known as his or her employee account.... As of January 1 of each such year, a member'[s employee account shall be equal to one hundred percent of his or her employee account as o the next preceding January 1, increased by any regular interest earned and any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307.

Sec. 23-2309 (Reissue 1991).

(1) A member's share of the fund arising from the county contributions shall be known as his or her employer account. Prior to January 1,m 1981, as of any January 1 a member'[s employer account shall be equal to his or her account as of the next preceding January 1, increased by two hundred percent of any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. As of January 1, 1982, a member's employer account shall be equal to the account as of January 1, 1981, increased by two hundred percent of the amounts deducted from the member's compensation for the

first nine months of the year and two hundred fifty percent for the final three months of the year in accordance with section 23-2307. As of January 1, 1983, and each year thereafter, the member;s employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307.

Sec. 23-2310 (Reissue 1991).

The retirement value for any employee who retires under the provisions of section 23-2315 shall be the sum of the employee's employee account and employer account as of the retirement date.

Sec. 23-2316 (Reissue 1991).

Effective July 15, 1992, the Legislature amended Sections 23-2308 and 23-2310. 1992 Neb. Laws, L.B. 1057. The following concluding language was added to Sec. 23-2308: ", which two hundred fifty percent equals the employees' contributions plus the county's contributions of one hundred fifty percent of the employees' contributions." In Sec. 23-2310, the word "two" was in each instance changed to "one."

Hoiengs began his employment with Cass County in 1987 and began participating in the retirement system in January 1988. He terminated his employment on July 11, 1994. Buzek was appointed sheriff of Saline County in December 1979 and has participated int he retirement system since that time. As a general matter, for the relevant time period, the participating counties have contributed to the various employee accounts 150 percent of the contributions made by members of the retirement system.

IV. ANALYSIS

1. LAW OF CASE

In the first assignment of error, the plaintiffs assert that the district court erred in not applying the law of the case as established in Hoiengs I. In essence, their argument is that by reversing the judgment and remanding that caused to the district court in Hoiengs I, we determined that the retirement act requires a county contribution of 250 percent. Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. Talle v. Nebraska Dept. of Soc. Servs., 253 Neb. 823, ___ N.W.2d ___ (1998); Latenser v. Intercessors of the Lamb, Inc., 250 Neb. 789, 553 N.W.2d 458 (1996); Pendleton v. Pendleton, 247 Neb. 66, 525 N.W.2d 22 (1994). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. Talle, supra; In re Application of City of Lincoln, 243 Neb. 458, 500 N.W.2d 183 (1993).

It is true that in Hoiengs I, we held that the district court erred in determining that Hoiengs had failed to state 66a cause of action. However, it must be borne in mind that when reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the pleader's conclusions. Galyen v Balka, 253 Neb. 270 570 N.W.2d 519 (1997). The questions we addressed and resolved in connection with a demurrer in Hoiengs I involved only the propriety of brings a declaratory judgment action and whether Hoiengs had successfully pled an action on behalf of a class consisting of "current and past" participants in the system. Hoiengs I, 245 Neb. at 900, 516 N.W.2d at 240. In holding that Hoiengs had stated a cause of action on behalf of a class,

we wrote that:

> [t]he case will turn on the interpretation of a statutes governing county contributions. So far as now appears, the effect on Hoiengs and the others will, in that regard, be basically the same, an increase in the amount of contributions to their employer accounts or no change to their accounts.

Id. at 903, 516 N.W.2d at 241. As this language clearly indicates, nowhere in the opinion did we interpret the statutes governing the amount of contributions to be made by the counties. As a result, this assignment of error has no merit.

2. CONSTRUCTION OF RETIREMENT ACT

In the second assignment of error, the plaintiffs make a variety of arguments which combine to urge that the district court erred in concluding that the counties are required to contribute only 150 percent of the members' contributions to the employee accounts.

The plaintiffs essentially argue that Sec. 23-2310 is clear in stating that "the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1...." On the other hand, the counties contend that Sec. 23-2310 is inconsistent with Sec. 23-2308.

Section 23-2308 declares that "[t]he county clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amounts deducted from the compensation of employees...." However, Sec. 23-2309 requires that employee accounts be increased by 100 percent of the compensation deduction, and the pre-1992 version of Sec. 23-2310 stated that the employer account be increased by 250 percent of the compensation deduction. The obvious problem is that the retirement act instructed the county clerk to pay the primary carrier an amount equal

to 250 percent of the deduction, but the sum of the contributions contemplated by Sections 23-230 and 23-2310 together equaled 350 percent of the amount deducted. While the relevant language of sections 23-2308 and 23-2310 was clear and unambiguous, it was in conflict.

It is true that in accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails. Sidney Education Assn. v. School Dist Of Sidney, 189 Neb. 540, 203 N.W.2d 762 (1973); Stoller v. State, 171 Neb. 93, 105 N.W.2d 852 (1960); Markel v. Glassmeyer, 137 Neb. 243, 288 N.W. 821 (1939); Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N.W. 366 (1939). However, the fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination. Wounded Shield v. Gunter, 225 Neb. 327, 405 N.W.2d 9 (1987); Malone v. Benson, 219 Neb. 28, 361 N.W.2d 184 (1985). It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible. Smith v. Smith, 242 Neb. 81, 497 N.W.2d 44 (1993); Malone, supra. Where it is possible to harmonize apparently conflicting statutes, such is to be done. See Sidney Education Assn., supra.

As it is not possible to harmonize sections 23-2308 and 23-2310, we look to the axiom that in order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. Wagoner v. Central Platte Nat. Resources Dist., 247 Neb. 233, 5 26 N.W.2d 422 (1995). "All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one." Id. at 241, 526

N.W.2d at 428.

As it existed from 1965 to 1981, the retirement act provided that the member's employer account be equal to the member's account as of the next preceding January 1, increased by an amount equal to any amounts deducted from the member's salary since the next preceding January 1, that is to say, 100 percent. Sec. 23-2310 (Reissue 1970). Section 23-2308 provided that the county clerk pay to the primary carrier an amount equal to 200 percent of the amounts deducted from a member's compensation. Section 23-2308 (Reissue 1970). Thus, no contradiction existed at this point.

The problem began with the 1981 amendment through 1981 Neb. Laws, L.B. 459, whereby the Legislature increased the amount to be paid by the county clerk under Sec. 23-2308 to an amount equal to 250 percent of the amount deducted. Because L.B. 459 did nothing to change Sections 23-2309 and 23-2310, the sum of the employee and employer accounts still increased by an amount equal to 100 percent of the amount deducted from a member's compensation, that is to say, a total of 200 percent. In an attempt to remedy the inconsistency caused by the adoption of L.B. 459, the Legislature adopted 1983 Neb. Laws, L.
B. 313, which amended the relevant portions of Sec. 23-2310 as set forth in part III above.

In enacting L.lB. 313, the Legislature attempted to recite what the counties had contributed in the past and changed the contributions to be made by them in the future. Unfortunately, the recitation in LO.B. 313 of what the act provided prior to 1981 was wrong. The counties had contributed an amount equal to 100 percent of the amount deducted from a member's compensation, not 200 percent.

Thus, to remedy the problem and the conflict noted earlier, the Legislature enacted 1992 Neb. Laws, L.B. 1057, which made unmistakably clear that the 250 percent

refers to the combined total of the members' contributions and the counties' contributions.

In order to hold as the plaintiffs urge, we also would have to conclude that the Legislature's intention vacillated such that in 1965 it meant the counties to contribute an amount equal to the amount deducted from the members' compensation, intended in 1983 that the counties retroactively pay 100 percent more for deductions made prior to 1981, and in 1992 returned to requiring contributions equal to 100 percent of the amounts deducted from the compensation paid to members of the retirement system for this same period. Such a reading of the Legislature's intention would be absurd.

In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. Slagle v. J.P. Theisen & Sons, 251 Neb. 904, 506 N.W.2d 758 (1997); In re Interest of Jaycox, 250 Neb. 697, 551 N.W.2d 9 (1996). Courts will, if possible, try to avoid a construction of a statute which leads to absurd, unjust, or unconscionable results. Coleman v. Chadron State College, 237 Neb. 491, 466 N.W.2d 526 (1991). ""In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity...."" Id. at 500-01, 466 N.W.2d at 533.

Reading all of the Legislature's enactments in this regard together, including those adopted prior to the 1981 amendment through L.B. 459 and the amendment adopted in 1992 through L.B. 1057, we are led to the conclusion that at no time did the Legislature intend that the counties make contributions of 250 percent of the amounts deducted from the compensation paid to the members of the retirement system, but, rather, that it intended that all the contributions, those of the counties and the members together, total 250 percent of the amounts deducted from he compensation paid the members since the effective date

of L.B. 459.

3. CONSTITUTIONALITY OF 1992 AMENDMENT

The foregoing determination moots the third assignment of error, which claims that the 1992 amendment unconstitutionally impaired the vested contractual rights of the members of the system to a county contribution of 250 percent of the amounts deducted from their compensation. As L.B. 1057 did not reduce the amount of contributions required from the counties, there can be no impairment of any vested contractual rights.

V. JUDGMENT

Accordingly, as first noted in part 1, the judgment of the district court is affirmed.

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Daniel Hoiengs, also known as Daniel Hoins, on behalf of himself and all other persons similarly situated, and Byron Buzek, on behalf of himself and all other persons similarly situated, Appellants,

v.

County of Adams et al., Appellees.

Case Caption

Hoiengs v. County of Adams

Filed May 12, 1994. No. S-92-777.

Appeal from the District Court for Lancaster County: Bernard J. McGinn,Judge. Reversed and remanded.

Mary C. Wickenkamp and, on brief, Richard E. Scott and Brian R. Watkins for appellants.

Randall L. Goyette and Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, and Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellees County of Adams et al.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellees E. Benjamin Nelson et al.

Syllabus by the Court

1. Demurrer: Declaratory Judgments. The use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases.

2. Demurrer: Pleadings. In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual finds to aid the pleading, or consider evidence which might be adduced at trial.

3. Pleadings: Words and Phrases. A statement of facts sufficient to constitute a cause of action means narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.

4. Demurrer: Pleadings. In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, a demurrer

based on the failure to state a cause of action is to be overruled.

5. Actions: Parties. The propriety of substituting parties depends on whether the cause of action otherwise remains the same; thus, where such substitution will introduce a new cause of action into the case, the substitution will not be allowed.

6. Actions: Parties. In determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced.

7. Parties. In order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding.

8. Pleadings. Under Neb. Rev. Stat. Sec. 25-852 (Reissue 1989), a court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party.

9. Pleadings. The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.

10. Pleadings. Neb. Rev. Stat. Sec. 25-852 (Reissue 1989) is to be liberally construed and amendments permitted when proposed ***228** at an opportune time in the furtherance of justice.

11. Actions: Immunity. For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state.

12. Political Subdivisions: Counties. A county is a political subdivision of the state [245 Neb. 878] having subordinate powers of sovereignty conferred by the

Legislature.

13. Constitutional Law: Immunity: Waiver. Neb. Const. art. V, Sec. 22, providing that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought, permits the state to oay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.

14. Statutes: Immunity. Statutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state's sovereign immunity.

15. Immunity: Waiver. Waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.

16. Declaratory Judgments: Words and Phrases. The term "person," as used in the declaratory judgment statutes, is broad enough to include the state or any subdivision thereof.

17. Declaratory Judgments: Immunity: Appeal and Error. Just as an appellate court must determine the scope of review in an action for declaratory judgment from the nature of the dispute, so does such a court determine whether sovereign immunity lies.

18. States: Contracts: Employer and Employee. State retirement systems create contracts between the state and its employees who are members of the system.

19. Administrative Law: Governmental Subdivisions. An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects rights of private parties through either adjudication or rulemaking.

20. Counties: Claims: Warrants. Neb. Rev. Stat. Sec. 23-135 (Reissue 1991) applies where a claim is

not a mere formal prerequisite to the issuance of a warrant in payment, but, rather, requires quasi-judicial action int he sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.

21. Declaratory Judgments: Parties. The declaratory judgment statutes are applicable only where all interested persons are made parties to the proceedings.

22. Parties: Words and Phrases. An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.

23. Parties: Jurisdiction: Wavier. The presence of necessary parties to a suit is a jurisdictional matte and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment.

24. Actions: Words and Phrases. A cause of action consists of the fact or facts which give one a right to judicial relief against another.

25. Actions. Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other. [245 Neb. 879] whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.

26. Declaratory Judgments. In addition to the requirement that a justiciable issue must be presented for declaratory relief, a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties.

27. Courts: Jurisdiction: Contracts. A court

which has entered a judgment declaring *229 the rights of the parties under contract has the power to retain jurisdiction and grant further relief, which contemplates necessary supervision of such contracts and entry of supplemental judgments and orders from time to time.

28. Declaratory Judgments. The declaratory judgment statutes are remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered.

29. Statutes: Words and Phrases. While "or," when used properly, is disjunctive and "and" conjunctive, the words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute.

30. Class Actions. There is no mechanical test for determining whether in a particular cased the class is so numerous that the requirement of numerosity has been satisfied.

31. Class Actions. An action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.

32. Class Actions. The test of common interest to maintain a class action is whether all the members of the purported class desire the same outcome of the action that their representative desires.

33. Class Actions. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter.

34. Class Actions. In determining the ability of a plaintiff to represent a class, it must appear that the relief sought is beneficial to the class members and that the

plaintiff's interests are consonant with those of the other members of the class.

35. Class Actions. If any party included in a claimed class stands to suffer an economic loss as the result of his or her inclusion, the party initiating the class action will have an interest adverse to those of the parties he or she purports to represent, and, therefore, it can be said the action is not brought for the benefit of all members of the class.

36. Class Actions: Summary Judgment. Where the record demonstrates potentially conflicting interests within a class, it is appropriate to grant a motion for summary judgment as to the class aspect of the case.

37. Class Actions: Summary Judgment. All a court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts.

38. Class Actions: Demurrer. While it may in some cases be appropriate to challenge [245 Neb. 880] a cause of action by demurrer, the determination of whether the suit is maintainable as a class action usually should be predicated on more information than the petition itself.

39. Class Actions: Due Process. The procedure in a class action must conform to the requirements of due process and fairly ensure the protection of absent parties who are to be bound.

40. Class Actions: Due Process: Notice. In particular cases there may be a due process requirement of notice to absent class members even though thee is no express statutory requirement.

41. Class Actions: Due Process: Judgments: Notice,. The due process rights afforded by Neb. Const. art. I, Sec. 3, preclude binding any member of a claimed

class who does not receive notice of suit to any judgment rendered therein; one receiving notice is entitled to exercise his or her due process right to opt out of the class.

Richard E. Scott, Brian R. Watkins, and Mary C. Wickenkamp, Lincoln, for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., York, for appellees County of Adams et al.

***230** Randall L. Goyette and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, Lincoln, for appellees County of Burt et al.

Daniel E. Klaus, of Rembolt Ludtke Parker & Berger, Lincoln, for appellee County of Seward.

Don Stenberg, Atty. Gen., and Fredrick F. Neid, Lincoln, for appellee Retirement System for Nebraska Counties.

HASTINGS, C.J., and BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORAL, Justice

I. STATEMENT OF CASE

On his own behalf and on behalf of other current and past participants in the defendant-appellee Retirement System for Nebraska Counties (the system), the original plaintiff-appellant, William Fairbanks, then an employee of the defendant-appellee York County, sought a declaration that the employees of the 91 defendant-appellee counties are [245 Neb. 881] entitled, under the provisions of the County Employees Retirement Act, Neb. Rev. Stat. Sec. 23-2301 et seq. (Reissue 1991) (the retirement act), to greater retirement contributions from their respective employer counties than is presently the case. He also sought, insofar as is relevant to this review, declarations requiring the defendant counties to contribute the difference int he level of contributions actually made and the level of contributions allegedly required under the retirement act and, although not naming it as a defendant, requiring the Public Employees Retirement Board (retirement board),

which administers the system, to compel the counties to contribute as required by the retirement act.

The defendants all demurred to the petition on the grounds that (1) the district court lacked jurisdiction over the defendants and the subject matter of the action, (2) there was a defect or misjoinder of the parties, (3) several causes of action were improperly joined, and (4) the petition did not state facts sufficient to constitute a cause of action.

The district court sustained the defendants' demurrers and thereafter dismissed Fairbanks' petition. Assigning, in summary, that ruling as error, he appealed to the Nebraska Court of Appeals. While the appeal was pending in that court, York County terminated Fairbanks' employment, and Fairbanks withdrew all his retirement funds. The Court of Appeals thereafter, upon Fairbanks' motion, granted leave to substitute Daniel Hoiengs, an employee of the defendant Cass County, as the plaintiff-appellant.

We subsequently, under the authority granted by Neb. Rev. Stat. Sec. 24-1106(3) (Cum. Supp. 1992), removed the matter to this court in order to regulate the caseloads of the appellate courts. We now reverse, and remand fore further proceedings consistent with this opinion.

II. SCOPE OF REVIEW

[1] We begin our review by recalling that the use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases. S.I.D. No. 272 v. Marquardt, 233 Neb. 39, 443 N.W.2d 877 (1989).

[245 Neb. 882] [2] In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts

not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. DeVaux v. DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994); Wheeler v. Nebraska State Bar Assn., 244 Neb. 786, 508 N.W.2d 917 (1993); Schieffer v. Catholic Archdiocese of Omaha, 244 Neb. 715, 508 N.W.2d 907 (1993).

[3] A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. Wheeler, supra; Schieffer, supra.

[4] In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. See, **#231** Wheeler, supra; St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., 244 Neb. 408, 507 N.W.2d 275 (1993).

III. RETIREMENT ACT

The next task is to familiarize ourselves with the retirement act, a necessary step to the understanding of the petition and issues presented by the challenge to the district court's ruling.

The retirement act establishes the system for the purpose of providing a retirement annuity or other benefits for employees of counties having a population of less than 100,000.

The participation of the counties became mandatory effective upon the earlier of the adoption of the system by the county board or January 1, 1987. § 23-2329. The system includes all county employees devoting 20 or more hours per week to county employment and all elected officers of a county with the exception of judges and persons making contributions to the School Retirement System of the State of Nebraska. § 23-2301(1). The membership of the system is composed of all full-time

employees who have been employees for a period of 12 continuous months and part-time employees who are at least 25 years of age, have been employed for a total of 12 months, and have exercised their option to join the retirement system. [245 Neb. 883] § 23-2306.

The share of the fund created by deductions from an employee's salary is defined as that person's "employee account" and constitutes half of the employee's source of retirement benefits. § 23-2309. Beginning January 1, 1985, 3.2 percent of each participating employee's monthly salary is "picked up" by the county either through a reduction in the cash compensation of the employee or a combination of a reduction in compensation and an offset against a future compensation increase. § 23-2307. These contributions are paid from the same fund source used to pay earnings to the employees. Id.

An amount equal to 250 percent of the amounts deducted from the employee's compensation is paid by the county to the primary carrier, § 23-2308, a life insurance or trust company designated by the board as administrator of the system, § 23-2301(12).

The "employer account," which is a member's share of the fund created by county contributions, makes up the second half of the source of an employee's retirement benefits. § 23-2310. The amount of the county's contributions is set out in § 23-2310:

> Prior to January 1, 1981, as of any January 1 a member's employer account shall be equal to his or her account as of the next preceding January 1, increased by two hundred percent of any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. As of January 1, 1982, a member's employer account shall be equal to the account as of January 1, 1981, increased by two hundred percent of the amounts deducted from the member's

> compensation for the first nine months of the year and two hundred fifty percent for the final three months of the year in accordance with section 23-2307. As of January 1, 1983, and each year thereafter, the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 in [245 Neb. 884] accordance with section 23-2307....
>
> ... [T]he total additions made to both the employee account and the employer account for any calendar year shall not exceed the lesser of thirty thousand dollars, as adjusted for cost-of-living adjustments announced by the Internal Revenue Service for each calendar year in which the adjustment is announced, or twenty-five percent of the member's compensation or such year. For purposes of this subsection, total additions for a calendar year shall equal the full amount allocated to the employer account for that year plus the lesser of (a) one-half of the member's contributions for that year or (b) the amount of the member's contributions in excess of six percent of his or her compensation for that year.

The retirement value for any employee who retires after attaining the age of 55 or **#232** because of disability is the sum of that person's employee account and employer account as of the person's retirement date. §§ 23-2315, 23-2315.01, and 23-2316. An employee who terminates employment prior to age 55 may, upon application, receive either a termination benefit not to exceed the amount of his or her employee account payable in a lump sum, plus a paid-up deferred annuity provided by the vested portion of the employer account, or a paid-up deferred annuity provided by the employee account and the vested portion

of the employer account. The employer account fully vests in the employee after the latter's participation for a period of 5 years. Sums remaining in employer accounts not collected by employees who have ended their employment before becoming eligible for retirement are used to meet the expenses incurred by the retirement board in connection with operating the system and to reduce the contributions of the counties to fund future benefits under the retirement act. § 23-2319.

IV. FACTUAL ALLEGATIONS

The operative petition asserts that since January 1, 1983, the defendant counties have failed to make payments to the employer accounts on behalf of employees consistent with the retirement act. Instead, according to the petition,k the counties have contributed an amount equal to 150 percent of the amount [245 Neb. 885] contributed by the employee, and not the required 250 percent. The petition further claims that the system has failed to administer and collect payments by the counties as the retirement act requires.

V. SUBSTITUTION OF PLAINTIFF

[5] Before proceeding to an analysis of the issues raised by the appeal from the district court's sustainment of the defendants' demurrers and dismissal of the petition, we turn our attention to the defendants' claim that as Fairbanks' employment with one of the defendant counties has terminated, he is not a proper person to bring this suit. However, inasmuch as Fairbanks is no longer the plaintiff, we need not, and therefore do not, concern ourselves with whether he could have maintained this suit notwithstanding the termination of his employment. Rather, we go to the issue of whether it was proper to permit the substitution of another plaintiff.

[6] The propriety of substituting parties depends on whether the cause of action otherwise remains the same. Thus, where such substitution will introduce a new cause

of action into the case, the substitution will not be allowed. See, West Town Homeowners Assn. v. Schneider, 215 Neb. 905, 341 N.W.2d 588 (1983); Collection Associates, Inc. v. Eckel, 212 Neb. 607, 324 N.W.2d 808 (1982); Meyer v. Sandhills Beef, Inc., 211 Neb. 388, 318 N.W.2d 863 (1982).

[7] In determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. See, Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906 (1941); Oetzel v. Martin, 163 Ohio St. 512, 127 N.E.2d 353 (1955) (two tests to be applied; whether same evidence will support both petitions and whether same measure of damages will apply to both). See, also, St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., 244 Neb. 408, 507 N.W.2d 275 (1993) (cause of action consists of facts which give right to judicial relief against another).

[8] Additionally, in order to substitute one party for another, the party substituted must bear some relation to the original party [245 Neb. 886] or possess an interest in the controversy sufficient to enable that party to maintain the proceeding. See Nelson v. Sing Oil Co., 122 Ga.App. 19, 176 S.E.2d 227 (1970) (substitution of party not authorized by statute providing for adding or disposing of parties).

[9] [10] [11] Where rules of practice governing amendments to pleadings permit the adding or striking out of the name of any party, such amendments have been held to permit the court, in its discretion, to allow the substitution of a new plaintiff for the original plaintiff. See, Harmelink v. Arvada, 41 Colo.App. 122, 580 P.2d 841 (1978); Oetzel v. Martin, supra; Pearlman v. Rowell, 121 R.I. 466, 401 A.2d 19 (1979); Superscope, Inc. v. Benjamin Co., Inc., 276 S.C. 231, 277 S.E.2d ***233** 596

(1981); Jacobson v. Southern Biscuit Co., 198 Va. 813, 97 S.E.2d 1 (1957). In our practice, under Neb. Rev. Stat. § 25-852 (Reissue 1989), "[t]he court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process or proceeding, by adding or striking out the name of any party..." The decision whether to allow or deny an amendment lies within the discretion of the court to which application is made. Maricle v. Spiegel, 213 Neb. 223, 329 N.W.2d 80 (1983); Tilden v. Beckmann, 203 Neb. 293, 278 N.W.2d 581 (1979); McCarty v. Morrow, 173 Neb. 643, 114 N.W.2d 512 (1962). However, the statute is to be liberally construed and amendments permitted when proposed at an opportune time in the furtherance of justice. Bittner v. Miller, 226 Neb. 206, 410 N.W.2d 478 (1987); Building Systems, Inc. v. Medical Center, Ltd., 213 Neb. 49, 327 N.W.2d 95 (1982); Kleinknecht v. McNulty, 169 Neb. 470, 100 N.W.2d 77 (1959) (it is abuse of discretion to refuse to permit amendment proposed at opportune time in furtherance of justice). Thus, we have held that amendments under this statute may even be made in this court after appeal. Lippire v. Eckel, 178 Neb. 643, 134 N.W.2d 802 (1965).

Here, Fairbanks sought to substitute one employee of the defendant counties for another. No other change was sought or made, and the newly named plaintiff bears the same relationship to the dispute as did his predecessor.

Under the circumstances, it cannot be said that the Court of [245 Neb. 887] Appeals abused its discretion in permitting Hoiengs to be substituted as the plaintiff.

VI. ANALYSIS OF ISSUES PRESENTED BY DISTRICT COURT'S RULING

That determination having been made, we consider the issues presented by this challenge to the district court's ruling.

1. CLAIMED LACK OF JURISDICTION

We turn first to the defendants' contention that the district court lacked jurisdiction over their persons and the subject matter of the action.

(a) Over Persons

The defendants first argue that the district court could acquire no jurisdiction over them as they are immune from suit because of their sovereign nature.

[12] [13] For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state. Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W.2d 654 (1993); Anstine v. State, 137 Neb. 148, 288 N.W. 526 (1939), overruled on other grounds, Beatrice Manor v. Department of Health, 219 Neb. 141, 362 N.W.2d 45 (1985). The retirement act provides that the system holds all cash and other property. § 23-2302. The system possesses the powers and privileges of a corporation, and the Attorney General is specifically designated as its legal adviser. § 23-2314. The close relationship between the system and the State is apparent through the legislative provisions which create and govern all of Nebraska's retirement systems. The retirement board responsible for administration of the system is also charged with responsibility of the State Employees Retirement Act, the School Retirement System, and the Nebraska State Patrol Retirement System. Neb. Rev. Stat. §§ 79-1503 (Reissue 1987) and 81-2019 Patrol Retirement System. Neb. Rev. Stat. §§ 79-1503 (Reissue 1987) and 81-2019 and 84-1305 (Cum.Supp. 1992). The Auditor of Public Accounts is responsible for making an annual audit of the system and an annual report concerning the condition of the system to the retirement board and to the Clerk of the Legislature. § 23-2313. The Legislature appoints five members of the Legislature to serve on a [245 Neb. 888] committee known as the Nebraska Retirement Systems Committee for the purpose of studying any legislative

proposal, bill, or amendment affecting any public retirement system established by the State of Nebraska or any political subdivision thereof. Neb. Rev. Stat. §§ 50-416.01 and 50-417 (Cum.Supp. 1992).

Thus, little argument is required to demonstrate that the system is clothed with the sovereign immunity of the state. Indeed, Hoiengs' brief presents no direct challenge to the system's status as a state agency.

***234** [14] Likewise, unless authorized by statute, neither may a county be sued, for a county is a political subdivision of the state having subordinate powers of sovereignty conferred by the Legislature. Frank v. Butler County, 127 Neb. 852, 257 N.W. 235 (1934). As such, it acts purely as an agent of the state. Rock Cty. v. Spire, 235 Neb. 434, 455 N.W.2d 763 (1990); Seward County Board of Commissioners v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (1976); State ex rel. Johnson v. County of Gate, 154 Neb. 822, 49 N.W. 2d 672 (1951). See Stevenson v. Richardson County, Nebraska, 9 F.R.D. 437 (D.Neb. 1949) (county is not by its nature corporate entity, but, rather, instrumentality erected by State whereby it administers its sovereign authority).

Having concluded that the system and the counties have sovereign immunity, the question becomes one of determining whether that immunity has been waived.

(i) System

[15] Neb. Const. art. V, § 22, provides that the "state my sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." While the provision is not self-executing, it permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962); Anstine, supra.

[16] [17] However, statutes authorizing suits against the state are to be strictly construed because such

statutes are in derogation of the state's sovereign immunity. Riley v. State, 244 Neb. 250, 506 N.W.2d 45 (1993); Concerned Citizens, supra; First Nat. Bank [245 Neb. 889] of Omaha v. State, 230 Neb. 259, 430 N.W.2d 893 (1988); Wiseman v. Keller, 218 Neb. 717, 358 N.W.2d 768 (1984); Frye v. Sibbitt, 145 Neb. 600, 17 N.W.2d 617 (1945). Waiver of sovereign immunity will only be found where stated" ' "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " Wiseman, 218 Neb. at 720, 358 N.W.2d at 770.

[18] As noted in part I, this is a declaratory judgment action brought pursuant to Neb. Rev. Stat. § 25-21, 149 et seq. (Reissue 1989). Although the system argues that it is not a person as defined in the declaratory judgment statutes, we have previously held that the term "person," as used in those statutes, is broad enough to include the state or any subdivision thereof. City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N.W.2d 156 (1945); State, ex rel, Smrha, v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937) (State embraced under expression "any person").

[19] While the declaratory judgment statutes do not waive the state's sovereign immunity, Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W.2d 654 (1993), such an action may be maintained under various other statutes permitting actions against the state, Riley, supra; Concerned Citizens, supra; Offuitt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955), aff'd. 351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151 (1956).

[20] [21] Just as we must determine the scope of our review in an action for declaratory judgment from the nature of the dispute, Donaldson v. Farm Bureau Life Ins. Co., 232 Neb. 140, 440 N.W.2d 187 (1989), so must we determine whether sovereign immunity lies. Hoiengs'

claim arises from his right to retirement benefits by virtue of his employment by a county participating in the system. In Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910 (1982), we found that a change in calculating a state patrolman's pension annuities resulted in an unconstitutional impairment of the patrolman's contract rights. We reasoned that since Nebraska law recognizes that public pensions are deferred compensation, it follows that Nebraska public [245 Neb. 890] employees have reasonable expectations with regard to their pensions rights which are protected by the law of contracts. Significantly, we stated that state retirement systems create contracts between the state and its employees who are members of the system. See, also, Omer v. Tagg, 235 Neb. 527, 455 N.W,.2d 815 (1990) (promises regarding health insurance made at time ***235** of employment involved deferred compensation and constituted contract enforceable against state); Caruso v,. City of Omaha, 222 Neb. 257, 383 N.W.2d 41 (1986) (accepting that right of public employee to receive benefits under public retirement plan is not gratuity, but, rather, is deferred compensation and is contractual in nature). Hoiengs' retirement rights are therefore contractual in nature.

The Legislature has specifically decreed that the "state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state." Neb. Rev. Stat. § 25-21, 206 (Reissue 1989). Accordingly, the system has waived its sovereign immunity under the provisions of § 25-21, 206. See, Omer, supra; VisionQuest, Inc. v. State, 222 Neb. 228, 383 N.W.2d 22 (1986).

(ii) Counties

There is authority for the proposition that as

counties have no independent sovereignty, any immunity from liability and suit they enjoy is nothing more than an extension of a state's immunity; therefore, any waiver by a state of its own immunity waives the immunity of its counties, even without separate statutory enactments. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Cox v. Vil. of Greenwich, 33 A.D.2d 264, 306 N.Y.S.2d 987 (1970). However, we need not decided that issue at this time, for by providing in Neb. Rev. Stat. § 23-135 (Reissue 1991) that "claims against a county shall be filed with the county clerk within ninety days from the time when any materials or labor, which form the basis of the claims, have been furnished or performed," the Legislature has expressly waived the counties' sovereign immunity with respect to contractual disputes.

[245 Neb. 891]

(b) Over Subject Matter

Next, the defendants assert that even so, the district court lacked jurisdiction over the subject matter of this action.

(i) System

We note first of all that Neb. Rev. Stat. § 81-1170.01 (Cum.Supp. 1992) requires that, with certain exceptions not relevant here, persons having claims against the state shall present the same, with appropriate documentation, to the Director of Administrative Services to be audited and settled within 2 years after the request accrues. In breach of contract actions, such is a mandatory step. J.L. Healy Constr. Co. v. State, 236 Neb. 759, 463 N.W.2d 813 (1990). See Westside Community Schools v. State Department of Education, 202 Neb. 712, 277 N.W.2d 73 (1979).

In some instances, we have refused to grant declaratory relief and have instead required compliance with claims statutes. E.g., Millard School Dist. v. State

Department of Education, 202 Neb. 707, 277 N.W.2d 71 (1979); Vision Quest, Inc., supra.

In Millard School Dist., after the State Department of Education denied a portion of the local board of education's expenses for special education, the local board filed an action for reimbursement, characterizing its action as one for declaratory judgment. However, noting that declaratory judgment is not appropriate where an equally serviceable remedy exists and pointing out that the dispute essentially presented a claim for money, we held that the statutory claim procedure had to be employed and thus refused declaratory relief. Perhaps even more significantly, we observed that the case did not present the classic declaratory judgment situation wherein one would otherwise be required to act or refrain from actin at one's legal peril, because the local board was required, in any event, to provide special education services to handicapped students; the only question was whether the expenditures of meeting that requirement were reimbursable.

In VisionQuest, Inc., the State, through its Director of Administrative Services, refused to fully reimburse VisionQuest for the cost of its services to two children in need of special educational facilities. VisionQuest filed suit as an appeal [245 Neb. 892] from the director's decision and prayed for the amount owed to it for services rendered and for a declaratory judgment and determination of its rights under ***236** the applicable statute. Again, we determined that the petition was simply a claim for money which required VisionQuest to follow the mandatory statutory procedure, which VisionQuest had failed to do in that it had filed its appeal from the director's decision out of time.

But here, the additional contributions would be paid by each county and thus would not be a direct claim upon the treasury of the State. For that reason alone, the State claims procedure is not applicable.

[22] The system argues that nonetheless, as a state agency, a declaratory judgment action against it can only proceed in accordance with the Administrative Procedure Act.

[23] While it is true that the Administrative Procedure Act governs procedures for administrative agencies and provides for judicial review of appeals from the contested rulings of such bodies, the procedures are only applicable to agencies defined in the act as being boards, commissions, departments, officers, divisions, or other administrative offices or unties of the state government which are authorized by law to make rules and regulations. See County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N.W.2d 880 (1996); Neb. Rev. Stat. §§ 84-901 (Reissue 1987) and 84-917 (Cum.Supp. 1992). Such rules and regulations do not include rules and regulations concerning the internal management of an agency which do not affect private rights, private interests, or procedures available to the public. § 84-901. An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects rights of private parties through either adjudication or rulemaking. Bowman v. City of York, 240 Neb,. 201, 482 N.W.2d 537 (1992). Nowhere does the retirement act grant the system authority to make rules and regulations which would make it subject to the Administrative Procedure Act. See Reed v. Parratt, 207 Neb. 796, 301 N.W.2d 343 (1981) (Administrative Procedure Act does not apply to internal operations).

[245 Neb. 893]

(ii) Counties

[24] Recognizing the underlying contractual nature of the claims, the counties, relying on § 23-135, contend that the claims Hoiengs asserts not only on his own behalf but on behalf of others must first have been submitted to each county. We have noted the requirement

of § 23-135, that claims based on contract be filed with the county, enables the county to acquire information concerning the rights asserted against it, to make proper investigation concerning the merits of claims against it, and to settle those of merit without the expense of litigation. Zeller Sand & Gravel v. Butler Co., 222 Neb. 847, 388 N.W.2d 62 (1986).

[25] In Zeller Sand & Gravel, a sand and gravel firm brought an action against Butler County for breach of a requirements contract. In determining whether § 23-135 was applicable to the contract before the court, we first noted that it has long been held that the statute applies to all claims arising from or out of a contract. See, Jackson v. County of Douglas, 223 Neb. 65, 388 N.W.2d 64 (1986) (includes claims for additional wages allegedly due for overtime work); Coverdale & Colpitts v. Dakota County, 144 Neb. 166, 12 N.W.2d 764 (1944) (includes all claims arising ex contractu whether express or implied). More significantly, we held in Zeller Sand & Gravel that § 23-135 applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment, but, rather, requires quasi-judicial action int he sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence. See Jackson, supra (compliance with county claims statute in cases against county involving claims arising out of contract and containing quasi-judicial questions of fact is mandatory). See, also, Heinzman v. County of Hall, 213 Neb. 268, 328 N.W.2d 764 (1983) (former director's salary was fixed by statute, thus precluding need for judicial action on part of board of county commissioners); McCollough v. County of Douglas, 150 Neb. 389, 34 N.W.2d 645 (1948) (rate of compensation for deputy clerk of district court fixed by statute required *237 only ministerial action, therefore

plaintiff not required to file claim with county [245 Neb. 894] clerk).

Concluding that the contract there in question required the county to decide factual questions base don evidence both as to whether the contract had in fact bene breached and, if so, as to the amount of damages proximately caused, we held that Zeller's petition failed to state a cause of action because it did not recite that the claim was first presented to the county. Zeller Sand & Gravel, supra.

The defendant counties here cite two cases seemingly similar to the case now before us, Jackson, supra, and Thompson v. City of Omaha, 235 Neb. 346, 455 N.W.2d 538 (1990), in which public employees sued to recover additional compensation. In both cases, the employees' petitions were dismissed for failing to comply with the appropriate county or city claims statute.

But the facts of those cases are inapposite to those now before us. In Jackson, the employees contended that they were entitled to recover compensation for a 15-minute period in which they were required to report early for the purpose of conferring with workers on the preceding shift, while in Thompson, city employees sought unpaid overtime wages earned but uncompensated for a period of 5 years within the filing date of the petition. Prior to their petition before the district court, the city council in Thompson had awarded the employees compensation for overtime earned during he 18-month period immediately preceding the filing of the claim. Because of the nature of the claims in both Jackson and Thompson, both of which would require factual determinations to be made, resolution was best suited to the city council or board of county commissioners.

In the instant case, however, Hoiengs asks for an interpretation of statutory language relating to the amount counties are required to contribute to the employer account

of each county employee. There are no questions of fact which would require a county's determination based upon the evidence presented which would place the matter within the purview of § 23-135; the statute thereafter does not apply.

2. CLAIMED DEFECT OR MISJOINDER OF PARTIES

The next question is whether there is, as the defendants [245 Neb. 895] claim, a defect or misjoinder of parties.

(a) Failure to Name Retirement Board

[26] [27] While not raised by the parties, first there is the matter of Hoiengs' failure to name the retirement board as a party defendant. It is clear that the declaratory judgment statutes are applicable only where all interested persons are made parties to the proceedings. Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W.2d 654 (1993); Krohn v. Gardner, 238 Neb. 460, 471 N.W.2d 391 (1991); Koenig v. Southeast Community College, 231 Neb. 923, 438 N.W.2d 791 (1989); Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., 229 Neb. 740, 428 N.W.2d 895 (1988); § 25-21, 159. Therefore, joinder of all necessary parties defendant is required. Haynes v. Anderson, 163 Neb. 50, 77 N.W.2d 674 (1956).

[28] An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party[s absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. See, Concerned Citizens, supra; Shepoka v. Knopik, 197 Neb. 651, 250 N.W.2d 619 (1977); City of Omaha v. Danner, 186 Neb. 701, 185 N.W.2d 869 (1971).

[29] In Redick v. Peony Park, 151 Neb. 442, 37 N.W.2d 801 (1949), we held
that the presence of necessary parties is a jurisdictional

matter and cannot be waived by the parties. It is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment. To ensure that joinder, the declaratory judgment statutes provide that no declaration shall prejudice the rights of persons not parties to the proceedings and likewise provide that the court may refuse to render a declaratory judgment when to do so would not terminate the uncertainty or controversy giving ***238** rise to the proceeding. §§ 25-21,154 and 25-21,159.

The retirement board is responsible for administering the system, § 23-2305, and, among other things, for providing for an equitable allocation of expenses among the various entities it administers. Neb. Rev. Stat. § 84-1503 (Supp. 1991).

However, while the retirement board is responsible for administering the system's funds, its duties do not require it to [245 Neb. 896] establish a county's contributions or to enforce the amount thereof; those matters are set by statute. See § 23-2310. Consequently, the retirement board is not an indispensable party. However, inasmuch as it is not a party, nothing decided in this suit will bind it. See Fowler v. Brown, 51 Neb. 414, 71 N.W. 54 (1897) (personal judgment against one not served with process and not appearing in action is void). See, also, Weiner v. State, 179 Neb. 297, 137 N.W. 2d 852 (1965).

(b) Naming of System and Counties

[30] The propriety of naming the system and the counties as defendants depends not only on whether both have an interest in the subject matter of this case, but whether each also has an interest of such a nature that a final decree cannot be entered without affecting its rights or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience as related to some legal right.

Professional Firefighters of Omaha v. City of Omaha, 243 Neb. 166, 498 N.W.2d 325 (1993). See, also, Shepoka, supra.

Under the provisions of the retirement act, the system, as noted in part VI(1)(a), transacts all business and holds all cash and other property. Any benefits to which county employees would be entitled pursuant to increased contributions would come out of the fund. Moreover, the retirement act provides that the system may be sued. § 23-2314. Therefore, any judicially determined right to increased contributions would be binding upon the system. See Crain v. Mo. State Employees' Retirement System, 613 S.W.2d 912 (Mo.App. 1981).

As Hoiengs challenges the amount of contributions being made by the counties into the employee retirement accounts, the counties are also interested parties. The obvious result, should Hoiengs be successful in this action, is that county employees would receive additional monies through county contributions. Therefore, the counties' interest is apparent because they pay the contributions from their own funds, and the result of this case will determine the amount of those contributions. See § 23-2307.

It therefore was not inappropriate for Hoiengs to name the [245 Neb. 897] counties and the system as parties defendant.

3. CLAIMED MISJOINDER OF CAUSES

The defendants next take the position that there has been a misjoinder of causes of action, in part because of the different procedures for bringing claims against the county and the system. However, as we came to understand through the analysis in subparts (b)(i) and (ii) of this part VI, the statutes on which the defendants rely in making this contention do not apply.

[31] [32] A cause of action consists of the fact or facts which give one a right to judicial relief against another. St. Paul Fire & Marine Ins. Co. v. Touche Ross

& Co., 244 Neb. 408, 507 N.W.2d 275 (1993); Widga v. Sandell, 236 Neb. 798, 464 N.W.2d 155 (1991). Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief. Sickler v. City of Broken Bow, 143 Neb. 542, 10 N.W.2d 462 (1943). Here, Hoiengs has alleged one cause of action relating to a contract arising out of a statute. See Neb. Rev. Stat. § 25-702 (Reissue 1989). See, also, Stahmer v. Marsh, 202 Neb. 450, 276 N.W.2d 87 (1979). Thus, there is no misjoinder of causes.

4. CLAIMED FAILURE TO STATE CAUSE OF ACTION

The question as to whether Hoiengs has stated a cause of action has two aspects: (a) ***239** whether he did so on his own individual behalf and (b) whether he did so on behalf of a class.

(a) On Individual Behalf

The defendants' contention that Hoiengs has not stated a cause of action on his own individual behalf in turn rests upon three arguments: (i) that the nature of a declaratory judgment action is such that it should not be entertained where there already exists special statutory procedures for making claims against them; (ii) that monetary damages are not available in a declaratory judgment action; and (iii) that in any event, declaratory relief would not end the controversy.

[245 Neb. 898]

(i) Nature of Declaratory Judgment

Having already determined in subpart (1)(b) of this part VI that the claims procedures do not apply, we need only note that we have previously held that a declaratory judgment action is an appropriate method to obtain judicial

construction of a statute. State Bd. of Ag. v. State Racing Comm., 239 Neb. 762, 478 N.W.2d 270 (1992); State v. Nebraska Assn. of Pub. Employees, 239 Neb. 653, 477 N.W.2d 577 (1991); State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989); § 25-21,150. Notwithstanding that the retirement act gives rise to contractual rights, it is the interpretation of the act which is the focus of this action. Indeed we have previously entertained declaratory judgment actions to determine the pension rights of public employees. For example, in Hooper v. City of Lincoln, 183 Neb. 591, 163 N.W.2d 117 (1968), a fireman sought declaratory relief to determine his pension rights. We determined that under the facts of the case, declaratory judgment was a proper procedure despite the city's argument that a fireman claiming disability benefits under the pension act must first file a claim against the city pursuant to statute and then, if dissatisfied with its disposition, appeal by petition in error to the district court. See, Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910 (1982); Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys., 199 Neb. 507, 260 N.W.2d 472 (1977).

(ii) Monetary Damages

[33] [34] It is true that Hoiengs asks for more than a declaration as to the contributions the retirement act requires of the counties, he also asks that the counties be required to pay the system the difference between the contributions they have made and those they should have made. The fact is, however, that a court may, among other things, grant a money judgment as consequential relief in a declaratory judgment action. Heimbouch v. Victorio Ins. Serv., Inc., 220 Neb. 279, 369 N.W.2d 620 (1985) (court in declaratory judgment action may not only construe contract, but is authorized to enter judgment for amount due thereunder); Dixon v. O'Connor, 180 Neb.

427, 143 N.W.2d [245 Neb. 899] 364 (1966) (where in declaratory judgment action court found relationship of parties to be that of landlord and tenant, granting of accounting was within equitable jurisdiction of court).

Thus, the fact that Hoiengs asks for relief which may include a money judgment does not mean he has failed to state a cause of action for declaratory relief.

(iii) Continuation of Controversy

[35] Lastly, in this regard, the defendants assert that declaratory relief is not appropriate because the "district court would be involved in the ongoing administration of the [system] for a very long time as members of the class were identified, claims heard and determined on a case by case basis, and arrangements for payments made." Brief or appellee Seward County at 9-10.

[36] In addition to the requirement that a justiciable issue must be presented for declaratory relief, a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties. Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., 229 Neb. 740, 428 N.W.2d 895 (1988); VisionQuest, Inc. v. State, 222 Neb. 228, 383 N.W.2d 22 (1986); Beatrice Manor v. Department of Health, 219 Neb. 141, 362 N.W.2d 45 (1985); ***240** § 25-21, 154. The court must make a full and complete declaration, and where it will be necessary to bring another action or proceeding to settle the controversy, declaratory judgment will not be granted. Graham v. Beauchamp, 154 Neb. 889, 50 N.W.2d 104 (1951); Dobson v. Ocean Accident & Guarantee Corporation, 124 Neb. 652, 247 N.W. 789 (1933).

It is true, as first detailed in part III, that a county employee is not entitled to benefits under the retirement act until he or she has retired after attaining the age of 55 or is disabled, or until after the employee reaches the age of

65 if he or she is terminated; only then are the county contributions which have been made to the employer account paid to the employee. Nonetheless, not only is the amount of contributions to be made by the counties set by statute, the statutes define the persons on whose behalf the contributions are to be made, [245 Neb. 900] § 23-2306, and set forth as well the amount of employee compensation which forms the basis for contributions, § 23-2330. Thus, the situation is not like that in Millard School Dist. v. State Department of Education, 202 Neb. 707, 277 N.W.2d 71 (1979), in which the claim was primarily one for money. Here, the primary focus is on the construction of the retirement act, the prayer for money being only incidental to the interpretation of the act.

[37] [38] Moreover, the fact that the court may need to grant further relief after entering a declaratory judgment does not make a case unsuitable for declaratory relief. As we said in First Nat. Bank v. Omaha Nat. Bank, 191 Neb. 249, 214 N.W.2d 483 (1974), the court which has entered a judgment declaring the rights of the parties under contract has the power to retain jurisdiction and grant further relief, which contemplates necessary supervision of such contracts and entry of supplemental judgments and orders from time to time.

[39] The declaratory judgment statutes are remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered. § 25-21,160. See Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N.W.2d 794 (1968).

Hoiengs has therefore pled a declaratory judgment action on his own behalf.

(b) On Behalf of Class

[40] The next question is whether Hoiengs has successfully pled an action on behalf of a class consisting

of "current and past" participants in the system.

Class actions are authorized under Neb. Rev. Stat. § 25-319 (Reissue 1989), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

[41] While "or," when used properly, is disjunctive and "and" conjunctive, the words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a [245 Neb. 901] strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute. See Rapid Film Service, Inc. v. Bee Line Motor Freight, 181 Neb. 1, 146 N.W.2d 563 (1966); Richter v. City of Lincoln, 136 Neb. 289, 285 N.W. 593 (1939); Carlsen v. State, 127 Neb. 11, 254 N.W. 744 (1934).

Surely it would be absurd to say that two persons litigating a question of common interest should, for that reason alone, be afforded class action treatment; it would be equally absurd to say that 50,000 persons litigating questions having no common or general interest should be so treated. Thus, the second "or" in the phrase "common or general interest of many persons, or when the parties are very numerous" requires that both of the designated conditions exist. That is, in order to justify class status treatment, there must exist both a question of common or general interest and numerous parties so as to make it impracticable to bring all the parties before the court. See Berkshire & Andersen v. Douglas County Board of Equalization, 200 Neb. 113, 262 N.W.2d 449 (1978).

[42] There is no mechanical test for determining whether in a particular case the **241** class is so numerous that the requirement of numerosity has been satisfied. Kelley v. Norfolk & W. Ry. Co., 584 F.2d 34 (4th Cir. 1978). Nonetheless, here Hoiengs' allegation that 9,000

employees have been affected by the statute meets the numerosity requirement; the impracticality of joining such a large number of parties is obvious.

[43] However, the question as to whether the commonality requirement has been met is a more complicated matter. In Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946), opinion vacated on reh'g 147 Neb. 1018, 25 N.W.2d 908 (1947) we stated that an action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.

The defendants urge that as Hoiengs could not satisfy a judgment, class action status is inappropriate. In State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5 (1970), the relaters on behalf of all taxpayers similarly situated asked that the court make provisions for paying claims for the refund of taxes illegally collected and disbursed to all taxpayers having [245 Neb. 902] the right to file such claim. We determined that the action could not be brought as a class action because in such a case the " ' "judgment must not only be for each according to the amount due him, but must depend upon whether each as an individual paid voluntarily or involuntarily." ' " Id. at 232, 175 N.W.2d at 6. In addition, we pointed to the procedural difficulties and confusion inherent in attempting to judicially control in a class action the ministerial actions of a county treasurer where, by statute, such a refund must be individually determined. See, Boersma v. Karnes, 227 Neb. 329, 417 N.W.2d 341 (1988), appeal dismissed 488 U.S. 801, 109 S.Ct. 29, 102 L.Ed.2d 9; Gates v. Howell, 211 Neb. 85, 317 N.W.2d 772 (1982); Riha Farms, Inc. v. County of Sarpy, 212 Neb.l 385, 322 N.W.2d 797 (1982); Hansen v. County of Lincoln, 188 Neb. 461, 1 Neb. 798, 197 N.W.2d 651 (1972); State ex rel. Sampson, supra; Neb. Rev. Stat. § 77-2795 (Reissue 1990).

What distinguishes State ex rel, Sampson and similar cases from the case now before us is our reference to the "peculiarly individual requirements of the refund statute" and the policy of the Legislature in normally not refunding taxes paid under a mistake of law unless such request is made pursuant to statute. State ex rel. Sampson, 185 Neb. at 233, 176 N.W.2d at 7.

In contrast, observing that class actions rendered unnecessary the proliferation of litigation of individual suits, we permitted a city policeman on behalf of himself and all city policemen and firemen to recover an amount erroneously deducted for pension purposes from their salaries. Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975). We held that where 400 parties would be entitled to share in the funds, where the amount due each was small, and where questions of law and fact were common to all and predominated over individual interests, the plaintiff, in representing his own interest, necessarily would represent interest of all members of the class.

Unlike cases where, by the very nature of the facts, each of the claimants stood or fell on facts applicable only to that claimant, here, there is at this point nothing unique about Hoiengs' legal claim from other members of the class. All are concerned with the manner in which the retirement act has been [245 Neb. 903] applied to the employees' retirement accounts. The case will turn on the interpretation of the statutes governing county contributions. So far as now appears, the effect on Hoiengs and the others will, in that regard, be basically the same, an increase in the amount of contributions to their employer accounts or no change to their accounts.

Further, although in the instant case the amount of recovery would be different for each employee, judgment would not require varying proof as to the right of each employee to participate in the fund. Daar v. Yellow Cab

Co., 67 Cal.2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (percent of rate of overcharge to each member of class was identical and uniform and known to defendant and would not require each individual plaintiff to appear); Fanucchi v. Coberly-West Co., 151 Cal.App.2d 72, 311 P.2d 33 (1957) (action by 18 cotton growers on behalf of themselves and others similarly situated against ginning ***242** company to recover for portion of see derived from cotton delivered to defendants could be properly maintained as class action where facts necessary to establish liability on part of defendant was exactly the same despite different pro rata recovery by each grower; while recovery of grower would have to correspond with weight of cotton delivered, that is matter of record and amount of each grower's recovery could easily be ascertained by mere mathematical computation).

We thus conclude that Hoiengs has stated a cause of action on behalf of a class. Whether the evidence will develop conflicts between Hoiengs and the others he seeks to represent cannot, of course, be known at this time.

[44] [45] [46] The test of common interest to maintain a class action is whether all the members of the purported class desire the same outcome of the action that their representative desires. Browne v. Milwaukee Bd. of School Directors, 69 Wis.2d 169, 230 N.W.2d 704 (1975). Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. Sarratt v. Lincoln Benefit Life Co., 212 Neb. 436, 323 N.W.2d 81 (1982); Evans v. Metropolitan Utilities Dist., 185 Neb. 464, 176 N.W.2d 679 (1970). In determining the ability of a plaintiff to represent a class, it must appear that the relief sought is [245 Neb. 904] beneficial to the class members and that the plaintiff's interests are consonant with those of the other members of the class. Luitweiler et al. v. Northchester Corp., 456 Pa. 530, 319 A.2d 899

(1974).

Citing Blankenship v. Omaha P.P. Dist., 195 Neb. 170, 237 N.W.2d 86 (1976), the defendants argue that in this case, employees working in one county but living in another would not want the county in which they lived to contribute the additional amounts to others' retirement funds because of the probable resulting increase in taxes that would be required to pay the additional contributions.

In Blankenship, a customer of a utility sought a refund of certain allegedly unlawful late charges on his own behalf and on behalf of those other customers or ratepayers of the utility who had or would in the future be required to pay said charges. We reasoned that if the plaintiff were successful, the utility would have to raise approximately $2,400,000 to make the refunds, and those customers who paid the penalty charge only once or rarely would likely be damaged economically int he long run by the increased rates which would have to be charged to pay the judgment. Thus,f we held that the would-be representative could not maintain a class action.

In an earlier case, Evans, supra, a ratepayer of a utility brought an action on his own behalf and that of all other ratepayers to compel the return to the district of certain statutory payments to the city. Concluding that not all ratepayers would be benefitted because many of them were also taxpayers of the city which would have to raise taxes to pay any judgment, we held that a class action was inappropriate. See, also, In re 1983-84 County Tax Levy, 220 Neb. 897, 374 N.W.2d 235 (1985) (residents and taxpayers challenging constitutionality of statute prescribing procedure under which tax levied by one district for providing schools to another district could not maintain class action in view of record showing potentiality of conflict of interest among members of class owning property located in both districts); Kosowski v. City Betterment Corp., 197 Neb. 402, 249 N.W.2d 481 (1977)

(where class included members who would stand to suffer if suit were successful in enjoining disbursement of funds).

[245 Neb. 905] [471] The general rule extracted from these cases is that if any party included in the claimed class stands to suffer an economic loss as the result of his or her inclusion,

the party initiating the class action will have an interest adverse to those of the parties he or she purports to represent, and, therefore, it can be said the action is not brought for the benefit of all members of the class. See Blankenship, supra.

[48] Thus, where the record demonstrates potentially conflicting interests within the class, it is appropriate to grant a motion for summary judgment as to the class aspect of the case. Sarratt, supra; Kosowski, supra. We said in Blankenship: "All the court ***243** need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts." 195 Neb. at 177, 237 N.W.2d at 90.

[49] However, at this point, the asserted conflict of interest between Hoiengs and the members of the claimed class is highly speculative. We have only the argument of the defendants that the class includes members whose taxes would be raised without receiving an offsetting benefit. While we have said that a petition for class status may be challenged by demurrer, Twin Loups Reclamation & Irr. District v. Blessin, 202 Neb. 513, 276 N.W.2d 185 (1979), it would be unjust under the allegations in the present petition to presume the presence of a conflict in the absence of evidentiary support. See Ross v. City of Geneva, 43 Ill.App.3d 976, 2 Ill. Dec. 609, 357 N.E.2d 829 (1976), affid 71 Ill.2d 27, 15 Ill. Dec. 658, 373 N.E.2d 1342 (1978). The determination of whether the

suit is maintainable as a class action usually should be predicated on more information than the petition itself. See, Beckstead v. Superior Court, 21 Cal. App.3d 780, 98 Cal. Rptr. 779 (1971); Lucas v. Pioneer, Inc., 256 N.W.2d 167 (Iowa 1977); Riley v. New Rapids Carpet Center, 61 N.J. 218, 294 A.2d 7 (1972); Hicks v. Milwaukee County, 71 Wis.2d 401, 238 N.W.2d 509 (1976) (whether class action may be maintained will seldom be answered on the face of the complaint, and demurrer or its equivalent will seldom be an appropriate way to object to a class action).

[245 Neb. 906] [50] There remains a further question none of the parties have raised. What members of the class are to be bound by the judgment entered herein?

[51] [52] Although our statute is silent on this issue, we acknowledge that the procedure in a class action must conform to the requirements of due process and fairly ensure the protection of absent parties who are to be bound. Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); Horst v. Guy, 211 N.W.2d 723 (N.D. 1973). Thus, in particular cases there may be a due process requirement of notice to absent class members even though there is no express statutory requirement. See, Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976); Graham v. Bd. of Supervisors, 25 A.D.2d 250, 269 N.Y.S.2d 477 (1966), appeal dismissed 17 N.Y.2d 866, 218 N.E.2d 332, 271 N.Y.S.2d 295.

We are not unmindful that in Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975), we dispensed with notice, stating that notice was not required in all representative actions. However, therein, it appeared that as the plaintiff had won, there was no way in which the absent class members could be prejudiced by the judgment. Here, we cannot know the ultimate outcome.

One of the primary purposes of notice is so that one may ask to be excluded in order to avoid being bound by

a class action judgment and to permit those excluded to litigate their own claims. Sarasota Oil Co. v. Greyhound Leasing & Financial Corp., 483 F.2d 450 (10th Cir. 1973). Providing notice of an opportunity to opt out of the class fulfills due process by safeguarding individual interests and by allowing individuals to avoid being bound by a classwide judgment that otherwise would preclude them from litigating their claims separately. Waldo v. lakeshore Estates, Inc., 433 F.Supp. 782 (E.D.La. 1977), appeal dismissed 579 F.2d 642 (5th Dir. 1978); In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974), cert. denied 419 U.S. 1034, 95 S.Ct. 516, 42 L.Ed.2d 309; In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977); Redhail v. Zablocki, 418 F.Supp. 1061 (E.D.Wis. 1976), aff'd 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

[245 Neb. 907] We are persuaded that the due process rights afforded by Neb. Const. art. I, § 3, preclude binding any member of the claimed class who does not receive notice of this suit to any judgment rendered herein. In like, vein, one receiving notice is entitled to exercise his or her due process right to opt out of the class.

***244.** VII. JUDGMENT

For the foregoing reasons, we, as first stated in part I, reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., participating on briefs.

23-2301. Terms, defined. As used in the County Employees Retirement Act, unless the context otherwise requires:

(1) Employees shall mean all persons or officers who are employed by a county of the State of Nebraska devoting twenty or more hours per week to such employment, all elected officers of a county, and such other persons or officers as are classified from time to time as permanent employees by the county board of the county by whom they are employed, except that the term shall not include judges, persons making contributions to the School Retirement System of the State of Nebraska, or nonelected employees and nonelected officials of any county having a population in excess of one hundred thousand inhabitants;

(2) Retirement shall mean qualifying for and terminating employment after becoming qualified to receive the retirement allowance granted under the County Employees Retirement Act;

(3) Retirement board or board shall mean the Public Employees Retirement Board;

(4) Retirement system shall mean the Retirement System for Nebraska Counties;

(5) Required contribution shall mean the deduction to be made from the compensation of employees as provided in the County Employees Retirement Act;

(6) Service shall mean the actual total length of employment as an employee and shall include leave of absence because of military services when properly authorized by the retirement board, except that service shall not include any period of disability for which disability retirement benefits are received under section 23-2315.

(7) Straight life annuity shall mean an ordinary annuity, payable for the life of the primary annuitant only, and terminating at his or her death without refund or death benefit of any kind;

(8) Date of adoption of the retirement system by

each county shall mean the first day of the month next following the date of approval of the retirement system by the county board or January 1, 1987, whichever is earlier;

(9) Prior service shall mean service prior to the date of adoption of the retirement system;

(10) Future service shall mean service following the date of adoption of the retirement system;

(11) Group annuity contract shall mean the contract issued by one or more life insurance companies to the board in order to provide the future service benefits described in the County Employees Retirement Act;

(12) Primary carrier shall mean the life insurance company or trust company designated by the retirement board as the administrator of the retirement system;

(13) Regular interest shall mean the rate of interest earned each calendar year commencing January 1, 1975, as determined by the retirement board in conformity with actual and expected earnings on its investment;

(14) Disability shall mean an inability to engage in a substantially gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of a long and indefinite duration;

(15) Date of disability shall mean the date on which a member is determined by the board to disabled;

(16) Guaranteed investment contract shall mean an investment contract which guarantees that the account maintained for any participant will not decrease in value but will increase each year by the contributor allocated to the account and by investment earnings and will decrease the amount of expenses reasonably determined to the allocated to the account; and

(17) Investment manager shall mean one or more insurance companies, bank trust department, or independent investment advisors designated to invest any portion of the funds of the County Employees Retirement Act.

Source: Laws 1965, c. 94, § 1, p. 402; Laws 1969, c. 172, § 1, p. 750; Laws 1973, LB 216, § 1 Laws 1974, LB 905, §1; Laws 1975, LB 47, § 1; Laws 1975, LB 45, § 1; Laws 1984, LB 216, § 2; Laws 1985, LB 347, § 1; Laws 1985, LB 432 § 1; Laws 1986, LB 311, § 2; Laws 1991, LB 549, § 1.

23.2302. Retirement System for Nebraska Counties; establish; purpose. A county employees retirement system shall be established for the purpose of providing a retirement annuity or other benefits for the purpose of providing a retirement annuity or other benefits for employees as provided by the County Employees Retirement Act. It shall be known as the Retirement System for Nebraska Counties, and by such name shall transact all business and hold all cash and other property as provided in the County Employees Retirement Act.

Source: Laws 1965, c. 94, § 2, p.

403; Laws 1985, LB 347, § 2; Laws 1985, LB 432, § 2.

23-2303 and 23-2304. Repealed. Laws 1973, LB 216, § 4.

23-2305. Public Employees Retirement Board; powers and duties; rules and regulations. It shall be the duty of the board to administer the County Employees Retirement Act as provided in section **84-153.** The board shall adopt and promulgate rules and regulations to carry out the act which shall include provisions defining what constitutes compensation of a member of the retirement system for purposes of the act. The definition of compensation shall include base salary or wages paid by the employer to the employee, including overtime pay for services rendered, and any other amounts determined by the board to appropriately constitute compensation.

Source: Laws 1965, c. 94, § 5 p. 404; Laws 1969, c. 172, § 2, p. 752; Laws 1979, LB 416, § 1; Laws 1985, LB 347, § 3; Laws 1991, LB 549, § 2.

23-2306. Retirement system; members; employees; elected officials. The membership of the retirement system shall be composed of (1) all full-time employees who have been employees for a period of twelve continuous months, except that elected officials shall be eligible for membership on taking office, and (2) all part-

time employees who have attained the age of twenty-five and have been employed for a total of twelve months and who exercise the option to joining the retirement system. An employee who exercises the option to join the retirement system shall remain in the system until termination of retirement.

Source: Laws, 1965, c. 94, § 6, p. 405; Laws 1975, LB. 32, § _____; 1984, LB 216, § 3; Laws 1985, LB 349, § 1; Laws ____ LB 549, § 3.

23-2307. Retirement system; members contribution; amount county pay. Each employee who is a member of the retirement system shall pay to the county or have picked up by the county a sum equal to three and two-tenths percent of his or her compensation for each pay period.. The county shall pick up the employee contributions required by this section for all compensation paid on or after January 1, 1985 and the contributions so picked up shall be treated as employer contributions in determining federal tax treatment under the United States Internal Revenue Code, except that the county shall continue to withhold federal income taxes based upon these contributions until the Internal Revenue Service, or the federal courts, rule that, pursuant to section 414(h) of the United States Internal Revenue Code, these contributions shall not be included as gross income of the employee until such time as they are distributed or made available. The county shall pay these employee contributions from the same source of funds which is used in paying earnings to

the employee. The county shall pick up these contributions by a compensation deduction either through a reduction in the cash compensation of the employee or a combination of a reduction in compensation and offset against a future compensation increase. Employee contributions picked up shall be treated for all purposes of the County Employees Retirement Act Act in the same manner and to the extent as employee contributions made prior to the date picked up.

Source: Laws, 1965, c. 94, § 7, p. 405; Laws 1981, LB 459, § 1, ____ 1984, LB 218, § 1; Laws 1985, LB 347, § 4; Laws ___ LB 549, § 4.

23-2308. Retirement system; county clerk; payment to primary carrier. The county clerk shall pay to the primary carrier an amount equal to two hundred fifty percent of the amounts deducted from the compensation of employees in accordance with the provisions of section 23-2307.

Source: Laws 1965, c. 94, § 8, p. 405; Laws 1981, LB 459, _____ 1991, LB 549, § 5.

23-2309. Retirement system; employee account, defined, interest credited to account. A member's share of the fund arising from compensation deductions made in accordance with section 23-2307 shall be known as his or her employee account. Each year commencing January 1

1975, and ending December 31, 1985, regular interest shall be credit to the employee account. As of January 1 of each such year of member's employee account shall be equal to one hundred percent of his or her employee account as of the next preceding January 1, increased by any regular interest earned and any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307.

On and after January 1, 1986, the employee account shall be equal to the sum of the employee's guaranteed investment account, equities account, and any assets of additional accounts created pursuant to section 23-2309.01

Source: Laws 1965, c. 94, § 9, p. 405; Laws 1974, LB 905, § 2; Laws 1983, LB 313, § 1; Laws 1985, LB 347, § 5; Laws 1991, LB 549, § 6.

23-2309.01. Employee account; investment options; procedures; administration. (1) On or after January 1, 1986, on such date as is established by the retirement board, each member of the retirement system shall be allowed to allocate all contributions to his or her employee account after such date to various investment options. Such investment options shall include, but not be limited to, the following:

(a) A fund which shall be known as a guaranteed investment account and which shall be invested in one or more guaranteed investment contracts; and

(b) An account which shall be known as an equities account and which shall be invested in common

stocks.

If a member fails to select an option or combination of options, all of his or her funds shall be placed in the option described in subdivision (a) of this subsection. Each member shall be given a detailed current description of each investment option prior to making or revising his or her allocation.

(2) Members of the retirement system may allocate their contributions to the investment options in increments of twenty-five percent in any proportion, including full allocation to any one option. A member may transfer any portion of his or her funds among the options, except that a member's investment in a guaranteed investment account shall not be transferred. The board shall establish provisions for changes of a member's allocation of contributions to his or her accounts after his or her most recent allocation and for transfers from one investment account to another.

If the board directs withdrawal of funds from an investment manager, the member shall also direct the investment of those funds.

(3) The board shall develop a schedule for the allocation of administrative costs of the various investment options and shall assess such costs so that each member pays a fair proportion based upon his or her choice of options and number of transfers among options.

(4) In order to carry out the section, the board may enter into administrative services agreements for accounting or record-keeping services. No such agreement shall be entered into unless the board determines that it will result in administrative economy and will be in the best interests of the county and its participating employees.

SOURCE: Laws 1985, LB 347, § 11; Laws 1991, LB 549, § 7 ___

23-2310. Retirement system; employer account,

defined; additions to employer and employee accounts; limitations. (1) A member's share of the fund arising from the county contributions shall be known as his or her employer account. Prior to January 1, 1981, as of any January 1 a member's employer account shall be equal to his or her account as of the next preceding January 1, increased by two hundred percent of any amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. As of January 1, 1982, a member's employer account shall be equal to the account as of January 1, 1981, increased by two hundred percent of the amounts deducted from the member's compensation for the first nine months of the year and two hundred fifty percent for the final three months of the year in accordance with section 23-2307. As of January 1, 1983 and each year thereafter, the member's employer account shall be equal to the account as of the next preceding January 1 increased by two hundred fifty percent of the amounts deducted from the member's compensation since the next preceding January 1 in accordance with section 23-2307. The member's employer account shall be increased by any interest allocated under the provisions of the guaranteed investment contract and reduced by any expense charges made under the provisions of the guaranteed investment contract. A member who ceased being an employee since the next preceding January 1 may have his or her employer account reduced in accordance with section 23-2319.

(2) Notwithstanding anything to the contrary in the County Employees Retirement Act, the total additions made to both the employee account and the employer account for any calendar year shall not exceed the lesser of thirty thousand dollars, as adjusted for cost-of living adjustments announced by the Internal Revenue Service for each calendar year in which the adjustment is announced, or twenty-five percent member's compensation for such

year. For purposes of this subsection, total additions for a calendar year shall equal the full amount allocated to the employer account for that year plus the lesser of (a) one-half of the member's contributions for that year or (b) the amount of the member's contributions in excess of six percent of his or her compensation for that year.

Source: Laws 1965, c. 94, § 10, p. 406; Laws 1981, LB 462, § 1 Laws 1983, LB 313, § 2 Laws 1985, LB 347, § 6; Laws 1986, LB 311, § 3; Laws 1991, LB 549, § 8.

No. 98-267

In The

Supreme Court of the United States

October Term, 1997

DANIEL HOEINGS, a/k/a DANIEL HOINS, on behalf of himself and all other persons similarly situated, and BYRON BUZEK, on behalf of himself and all other persons similarly situated,

Petitioners,

v.

COUNTY OF ADAMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

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STATEMENT OF THE CASE

This case involves a dispute over the amount Nebraska county governments were required to contribute to employee retirement accounts under the County Employees Retirement Act ("the Act"). This case is a consolidation of two class actions in which the plaintiff/petitioners are purported representatives of most present and past Nebraska County employees and the defendant/respondents are 91 Nebraska Counties and the Retirement System for Nebraska Counties. The plaintiff/petitioners contend that under the Act Nebraska counties were required to contribute 250% of the employee's contribution. The defendant/respondents contend that they were required to contribute only 150% of the employee's contribution.

The first case was originally filed in 1991 seeking a declaration on the amount of contribution required under the Act. In August of 1992, the Nebraska District Court for Lancaster County sustained a demurrer filed by the defendants on the ground that the petition failed to state a cause of action. From this decision, the plaintiffs appealed (*"Hoeings I"*). On appeal, The Nebraska Supreme Court reversed and remanded the case back to the District Court, holding that the petition did state a cause of action. *Hoeings v. County of Adams*, 516 N.W.2d 56, 248 Neb. 486 (1994). At that time, the plaintiffs' amended their petition to add additional parties and to plead additional facts.

In May of 1995, the plaintiffs filed a second case seeking a declaratory ruling that a 1992 Amendment to the County Retirement Act, Laws 1992, LB1057, was

unconstitutional because it violated the Due Process and Contract Clauses of the United States and Nebraska Constitutions. Both cases sought declaratory relief and monetary damages. The cases were consolidated for trial by the District Court.

On December 20, 1995, the District Court of Lancaster County, Nebraska, heard motions for Summary Judgment on behalf of the plaintiffs Buzek and Hoeings and on behalf of the defendants. The parties had earlier agreed that plaintiffs Buzek and Hoeings were representative of the entire class and, therefore, the district court could decide the issue of liability without certifying the entire class. On Summary Judgment, the district court addressed whether the Act from 1983 to 1992 required an employer contribution of 150% or 250%; whether the plaintiffs had a vested interest in 150% or 250% of the employer account prior to 1992; and whether the 1992 Amendment to the Act violated the plaintiffs' Due Process rights and was, therefore, unconstitutional.

In March of 1996, the district court granted summary judgment for the defendant Counties and against plaintiffs Buzek and Hoeings. The district court held that the Act required an employer contribution of 150%, which was the amount the counties had consistently contributed. The court also held that the 1992 Amendments were not unconstitutional because they did not take any vested rights from the plaintiffs. After the plaintiff/petitioners' Motions for New Trial were overruled, they appealed to the Nebraska Supreme Court.

On appeal for the second time (*"Hoeings II"*), the Nebraska Supreme Court affirmed the decision of the

district court. *Hoeings v. County of Adams*, 574 N.W.2d 498, 245 Neb. 64 (1998). The Nebraska Supreme Court held that the original Act was ambiguous. The court, using rules of statutory construction, determined that the original Act and its subsequent amendments required the counties to contribute 150% to the employees' retirement accounts. In so holding, the Nebraska Supreme Court stated that "at no time did the Legislature intend that the counties make contributions of 250 percent[.]" Because the Act required only a 150% contribution, the Nebraska Supreme Court held that the 1992 Amendment to the Act did not violate the plaintiffs' constitutional rights. Finally, the Nebraska Supreme Court held that there were no due process or other Constitutional violations because the county employees had nothing taken away from them given that the counties had consistently paid the required 150% contribution. From this decision, the plaintiffs petitioned for a writ of certiorari.

PERCEIVED MISSTATEMENT OF FACTS AND LAW

1. Throughout the petitioners' brief they state that the 1992 amendment to the County Retirement Act reduced the amount of the county contribution from 250% to 150%. In actuality, this is exactly one of the issues which the Nebraska Supreme Court had to decide on appeal in *Hoeings II*. The Nebraska Supreme Court found that because the Act required a 150% contribution all along, the 1992 amendment merely clarified the prior ambiguities in the Act and had no substantive effect on

the Act. *Hoeings v. County of Adams*, 574 N.W.2d 498, 505-05, 254 Neb. 64, 73-74 (1998).

2. Throughout the petitioners' brief they state that the Nebraska Supreme Court's holding in *Hoeings I* established that the Act required a 250% contribution. On the contrary, this is also one of the issues which the Nebraska Supreme Court had to decide on appeal in *Hoeings II*. In fact, the Nebraska Supreme Court held that under Nebraska law, the petitioners' argument had "no merit." *Hoeings*, 574 N.W.2d at 503; 254 Neb. at 70.

ARGUMENT

I. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI BECAUSE THIS CASE DOES NOT INVOLVE AN IMPORTANT ISSUE OF FEDERAL LAW.

This case revolves around the interpretation of Nebraska statutes directing Nebraska counties to contribute a certain amount to employee retirement accounts. The petitioners contend that the statutes require a 250% contribution. The respondents contend that the statutes require a 150% contribution. In *Hoeings II* the Nebraska Supreme Court resolved this issue. In *Hoeings II* the court interpreted state law and found that the statutes, when read in pari materia, were ambiguous and in need of judicial interpretation. *Hoeings v. County of Adams*, 574 N.W.2d 498, 503-05, 254 Neb. 64, 70-74 (1998). The court then used state law principles of statutory construction to hold that the statute required a contribution of only 150%. *Id.* Having so ruled, the Nebraska Supreme Court

went on to hold that subsequent amendments to the statute which clarified the ambiguities did not change the substantive meaning of the statutes. *Id.* As such, this Court should not grant certiorari because there are no important questions of federal law.

Nonetheless, the petitioners argue that when the Nebraska Supreme Court first addressed this case in *Hoeings I*, it ruled by implication that the statutes required a 250% contribution. Specifically, the petitioners argue that in *Hoeings I* the Nebraska Supreme Court, in reversing the granting of a demurrer and finding that the petitioners had stated a cause of action, the court necessarily had to find that the statutes required a 250% contribution. The petitioners then reason that the subsequent Nebraska Supreme Court decision in *Hoeings II* violated the Constitution because it reduced the contribution to 150%. In other words, the petitioners' argument is premised on the false assertion that the Nebraska Supreme Court previously ruled that the employee contribution was 250%. From that false assertion, the petitioners attempt to "create" a federal question by arguing that the Nebraska Supreme Court's subsequent decision reduced the contribution, thereby violating the Constitution. This argument, however, does not accurately state the nature of this case.

It is important to point out that the Nebraska Supreme Court rejected this very argument as being without merit. Specifically, the Nebraska Supreme Court stated:

> In holding that Hoeings had stated a cause of action on behalf of a class, we wrote that: "[t]he

> case will turn on the interpretation of the statutes governing county contributions. So far as now appears, the effect on Hoeings and the others will, in that regard, be basically the same, an increase in the amount of contributions to their employer accounts or no change to their accounts." As this language clearly indicates, nowhere in the opinion did we interpret the statutes governing the amount of contributions to be made by the counties. As a result, this assignment of error has no merit.

Hoeings, 574 N.W.2d at 503; 254 Neb. at 70 (quoting *Hoeings v. County of Adams*, 516 N.W.2d at 241, 245 Neb. at 903).

In so holding, the Nebraska Supreme Court relied entirely on Nebraska Law. Thus, under the petitioner's theory, the only way to establish a question of federal law is to persuade this Court that the Nebraska court was incorrect when it interpreted Nebraska law. In other words, the petitioners are asking this Court to reinterpret Nebraska law in a manner which is inconsistent with the Nebraska Supreme Court's interpretation. From that, the petitioners want this Court to find that this Court's reinterpretation of Nebraska law violates the Constitution of the United States. Because the petitioners are asking this Court to engage in a legal fiction in order to create an issue of Federal Law, this Court should refuse to accept the petitioners' invitation.

CONCLUSION

Because the decision of the Nebraska Supreme Court was based on adequate and independent State grounds and did not involve an important question of federal law, this Court should refuse to grant certiorari.

Respectfully submitted,

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